No. 87-814

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERMINAL REALTY PENN COMPANY,

Petitioner,

vs.

SEYMOUR AUERBACH,

Respondent.

JOINT BRIEF OF RESPONDENTS SVERDRUP CORPORATION, SVERDRUP & PARCEL, SVERDRUP & PARCEL & ASSOCIATES, JACKSON & TULL, CHARTERED ENGINEERS, DEVROUAX & PURNELL, ARCHITECT PLANNERS, P.C. AND LEGION DESIGN SYSTEMS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS SO CONSTRUE THE LANGUAGE AND CONGRESSIONAL POLICY OF 28 U.S.C. § 1498(b) THAT IT (A) LARGELY ABROGATED THE OPERATION OF THAT FEDERAL STATUTE AND (B) UNDERMINED THE INTEGRITY OF FEDERAL COPYRIGHT PROTECTION?

II. IN LIGHT OF A CONFLICT IN CIRCUITS AS TO THE PROPER SCOPE OF THE LEGAL RESPONSIBILITY OF THE UNITED STATES OF AMERICA FOR THE ACTIONS OF ITS CONTRACTORS AND SUBCONTRACTORS UNDER 28 U.S.C. § 1498, WHAT IS THE PROPER SCOPE OF THE FEDERAL GOVERNMENT'S LEGAL RESPONSIBILITY FOR SUCH ACTIONS UNDER 28 U.S.C. § 1498(b)?

III. DOES THE OPINION OF THE COURT OF APPEALS CONFLICT WITH THE DECISION OF THIS COURT IN *SPERRY GYROSCOPE CO. v. ARMA ENGINEERING CO.*, 271 U.S. 232 (1926), AND AS A RESULT, DID THE CIRCUIT COURT DEPRIVE PETITIONER OF DUE PROCESS OF LAW BY FAILING TO CONSIDER WHETHER THE DISMISSAL OF THE COMPLAINT BY THE DISTRICT COURT IN THIS ACTION UNDER FED. R. CIV. P. 19 CONSTITUTED A SEPARATE, INDEPENDENT AND LEGALLY SUFFICIENT GROUND UPON WHICH SUCH DISMISSAL COULD BE AFFIRMED ON APPEAL?

IV. IS THE UNITED STATES OF AMERICA, WHICH, AS SHOWN BY THE RECORD HEREIN,

(i) ASSUMED IN WRITING "SOLE AND EXCLUSIVE LIABILITY" FOR THE CLAIMS AT ISSUE IN THIS LITIGATION,

(ii) WAS DETERMINED BY A U.S. DISTRICT COURT TO BE "COMPLETELY IN CONTROL" OF THE FEDERAL CONSTRUCTION PROJECT AND SPECIFIC CONTRACT WHICH GAVE RISE TO THIS LITIGATION,

(iii) MAY ASSERT A UNIQUE DEFENSE WHICH WOULD BE A COMPLETE BAR TO ALL CLAIMS AGAINST ALL DEFENDANTS IN THIS ACTION, AND

(iv) WOULD BE SUBJECT TO A SUBSTANTIAL RISK OF INCURRING A LIABILITY WHICH MIGHT NEVER HAVE ARISEN IF IT WERE A PARTY TO THIS PROCEEDING,

AN INDISPENSABLE PARTY TO THIS LAWSUIT UNDER FED. R. CIV. P.19?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed herein are as follows:

(i) Appellant—Seymour Auerbach, and

(ii) Appellees—(a) Terminal Realty Penn Company, a wholly-owned subsidiary of The Penn Central Corporation; (b) Terminal Realty Baltimore Company, a subsidiary of CSX Corporation; (c) Sverdrup Corporation; (d) Sverdrup & Parcel, a partnership; (e) Sverdrup & Parcel & Associates, Inc.; (f) the District of Columbia; (g) Union Station Redevelopment Corporation; (h) Devrouax & Purnell, Architect Planners, P.C.; (i) Jackson & Tull, Chartered Engineers; and (j) Legion Design Systems, Inc.

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JOINT BRIEF OF RESPONDENTS SVERDRUP CORPORATION, SVERDRUP & PARCEL, SVERDRUP & PARCEL & ASSOCIATES, JACKSON & TULL, CHARTERED ENGINEERS, DEVROUAX & PURNELL, ARCHITECT PLANNERS, P.C. AND LEGION DESIGN SYSTEMS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (the "Circuit Court"), as amended, is officially reported at 829 F.2d 175 and is reprinted in the appendix to the Petition for Certiorari at p. 1a *et seq*. The Order and opinion of the United States District Court for the District of Columbia, from which appeal was taken, is not

officially reported and is reprinted in the appendix to the Petition at p. 14a *et seq.*

JURISDICTION

The judgment of the Circuit Court sought to be reviewed by the filing of the Petition was entered on September 22, 1987. The petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

The statutory provisions and regulations involved in this case are: (i) 28 U.S.C. § 1498(a), (ii) 28 U.S.C. § 1498(b), (iii) Fed. R. Civ. P. 19, (iv) 17 U.S.C. § 506(a), (v) 40 U.S.C. §§ 801-809, (vi) 40 U.S.C. §§ 811-819, (vii) 48 C.F.R. § 1227.401-71(b)(6)(ii) (1986), (viii) 48 C.F.R. § 1252.227-71(a)(c)(2) (1986), (ix) Fed. R. Civ. P. 12(b)(6), (x) 17 U.S.C. § 401, (xi) 17 U.S.C. § 402, (xii) 28 U.S.C. § 1331, (xiii) 28 U.S.C. § 1338(a), and (xiv) 28 U.S.C. §1254(1). These statutory provisions and regulations are reprinted in the appendix to the Petition at p.17a *et seq.*

STATEMENT OF THE CASE

Respondents Sverdrup Corporation, Sverdrup & Parcel, Sverdrup & Parcel & Associates (hereinafter "Sverdrup"), Jackson & Tull, Chartered Engineers, Devrouax & Purnell, Architect Planners, P.C. and Legion Design Systems, Inc. (hereinafter, collectively, the "Sverdrup respondents") were parties defendant in the District Court proceeding, C.A. No. 85-2493. Terminal Realty Penn Company was also a defendant

in the District Court action. In the District Court, Terminal Realty Penn Company filed a Motion for Summary Judgment alleging that under 28 U.S.C. § 1498, plaintiff was required to bring suit against the United States as his exclusive remedy for the causes of action alleged in his complaint. Additional Motions for Summary Judgment were filed, on other grounds, by various of the Sverdrup respondents. The U.S. District Court judge granted the Motion of Terminal Realty Penn Company and extended his Order of dismissal to all defendants below, since the basis for his decision involved an interpretation of statutes and rules which applied to all defendants.

In the Court of Appeals, Terminal Realty Penn Company, in its opposition brief filed in response to the brief filed by plaintiff Seymour Auerbach, argued the positions relating to application of 28 U.S.C. § 1498(b) and Federal Rules of Civil Procedure 12(b)(6) and 19. In a separate joint brief, the Sverdrup respondents agreed with the position of Terminal Realty Penn Company as follows:

> For the reasons set forth in Terminal Realty Penn Company's brief, the United States is, and always has been, the real party in interest as to the Union Station/Visitor Center project and Auerbach's involvement in it. The district court therefore properly dismissed the action. 28 U.S.C. § 1498(b); Fed. R. Civ. P. 19.

(Opposition Brief of the Sverdrup respondents filed in Appeal No. 86-5235, p. 14).The United States Court of Appeals for the District of Columbia Circuit reversed the Order of the District Court judge, holding that 28 U.S.C. §1498 did not mandate trial against the federal government in the United States Claims Court.

The Court of Appeals did not address the other arguments raised by Terminal Realty Penn Company or by the Sverdrup respondents, most notably the arguments regarding Federal Rule of Civil Procedure 19.

Terminal Realty Penn Company petitioned this Court for a writ of certiorari. By letter dated January 6, 1988, this Court has requested a response to the Petition for a writ of certiorari from all respondents.

REASONS FOR GRANTING THE WRIT

In the Petition, Terminal Realty Penn Company has set forth its reasons for granting the writ. The Sverdrup respondents agree with the reasons set forth in the Petition Brief, from pages 10 through 30. The reasons for granting a writ are summarized at footnote 8 of the Petitioner's Brief on page 10. The Sverdrup respondents believe that the United States Court of Appeals for the District of Columbia Circuit erred in its decision when it held that 28 U.S.C. § 1498(b) did not mandate trial against the federal government in the United States Claims Court on Seymour Auerbach's claims. The United States Court of Appeals for the District of Columbia Circuit also erred in failing to address the position of the United States as an indispensable party in accordance with Federal Rule of Civil Procedure 19.

The Sverdrup respondents believe that the major reasons that the Writ should be granted in this case are that the decision of the Circuit Court undermines the fundamental integrity of copyright protection and largely vitiates the efficacy and operation of a federal statute. The effect of the Circuit Court's decision far transcends the specific factual importance of this particular proceeding and holds the promise of significant

adverse implications of lasting national impact both upon the particular federal statute in question as well as upon the entire body of federal copyright law. Simply stated, federal copyright law just does not contemplate "intent" as an element in infringement actions involving the United States or any other party.

This case should also be reviewed by this Court to clarify, for both the federal government and its contractors, the proper scope of their respective legal responsibilities under 28 U.S.C.§ 1498, and to resolve the conflict among circuits which the decision of the Circuit Court in this proceeding has created.

PRAYER FOR RELIEF

For the reasons stated in the Petition filed by Terminal Realty Penn Company, respondents Sverdrup Corp., Sverdrup & Parcel, Sverdrup & Parcel & Associates, Jackson & Tull, Chartered Engineers, Devrouax & Purnell, Architect Planners, P.C., and Legion Design Systems, Inc. pray that a Writ of Certiorari be granted to review the decision and judgment of the Circuit Court in this proceeding.

Respectfully submitted,

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